

(2011) 11 PAT CK 0066
In the Patna High Court
Case No : First Appeal No. 164 of 1992

Mohd. Masood Akhtar and Others

APPELLANT

Vs

Mohd. Shamshad Khan and Others

RESPONDENT

Date of Decision : 22-11-2011

Acts Referred:

Citation : (2011) 11 PAT CK 0066

Hon'ble Judges : Mungeshwar Sahoo, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Mungeshwar Sahoo, J.—The plaintiffs appellants have filed this first appeal against the judgment and decree dated 30.09.1991 passed by the Sri Uday Narain Singh, learned Subordinate Judge, Bhagalpur in Title Suit No. 55 of 1991 dismissing the plaintiffs appellants' suit. The original plaintiff appellant Sheikh Jaliluddin died during the pendency of the appeal and his legal representatives have been substituted.

2. The plaintiff filed aforesaid title suit for declaration that the defendants 1st set and 2nd set have got no concern with the suit property and further for declaration that the decree passed in Title Suit No. 71 of 1973 is void ab initio.

3. The plaintiff claimed the aforesaid relief alleging that he is "Ghar Jamai" of Waizuddin Khan. He married the daughter of Waizuddin Khan namely Rakiba Khatoon. His father-in-law Waizuddin Khan transferred the suit property by Hibba on 7.5.1961. The suit property described in Schedule 1 originally belonged to Amir Khan. He had three sons who partitioned the property of Amir Khan in 1923. The suit property fell in the schedule of Mahtab Ali Khan. Mahtab Ali Khan had a son Waizuddin Khan. The said Mahtab Ali Khan transferred the suit property to Waizuddin Khan by Hibba and put him in possession of the property and he married another lady. Waizuddin Khan had a daughter Rakiba Khatoon. Waizuddin Khan gifted the property to plaintiff on 7.5.1961. The plaintiff

defaulted in payment of municipal tax therefore, the said suit property was sold in auction which was purchased by defendant 2nd party in collusion with the Municipal Amlas. The plaintiff has been living with his children in the suit property and he had got no knowledge about the auction sale prior to filing of the suit.

4. The plaintiff's further case is that he learnt that the defendant 1st party had filed Title Suit No. 71 of 1973 wherein the plaintiff was defendant No.4 but no summons were served on him. The summons were served Bala Bala and the defendant 1st party obtained the decree fraudulently in the year 1978 and, therefore, the said decree is liable to be set aside. The plaintiff had no knowledge about the said decree. The defendant 1st party are liable to be restrained to get the execution of the aforesaid decree.

5. In spite of service of notice the defendants did not appear and therefore, the suit was heard ex parte and the suit has been dismissed. The learned court below found that the plaintiff claimed oral Hibba whereas Ext.-1 has been filed which is unregistered and, therefore, it is not reliable. The learned court below also found that the plaintiff himself stated that he defaulted in payment of municipal tax and, therefore, the property was auction sold. In such circumstances, unless the auction is set aside no decree can be passed in favour of the plaintiff. The learned trial court also held that ex parte decree was passed in Title Suit No. 71 of 1973 in the year 1978 and the present suit has been filed in the year 1991 therefore, the suit is barred by law of limitation.

6. The learned counsel Mr. Abdul Mannan Khan appearing on behalf of the appellants submitted that the learned court below should have examined the allegation of fact that no notice was served on the plaintiff in Title Suit No. 71 of 1973. The learned counsel next submitted that when the plaintiff had no knowledge about the pendency of the suit and passing of the decree in the year 1978 earlier there was no question of suit being barred by law of limitation. As soon as the plaintiff came to know about the ex parte decree he filed the present suit but the learned court below held that the suit is barred by law of limitation. The learned counsel further submitted that the suit property belonged to the plaintiff therefore, the property could not have been sold in auction for non payment of municipal tax. The learned counsel further submitted that since the suit was decreed ex parte and there was no contrary evidence adduced by the defendants the learned court below should have relied upon the evidences adduced by the plaintiff but wrongly dismissed the suit. On these grounds, the learned counsel submitted that the judgment and decree are liable to be set aside and the plaintiffs' suit be decreed.

7. On the other hand, the learned senior counsel Mr. Raghiv Hassan appearing on behalf of the respondent 1st set submitted that although the defendants have not filed written statement but it is admitted fact by the plaintiffs that there was Title Suit No. 71 of 1973 which was filed by the co-sharer of the suit property against Rakiba khatoon wife of present plaintiff who is defendant 2nd party in the

present suit. In the suit Rakiba Khatoon was claiming that in auction sale the suit property was purchased by her therefore, she is the real owner of the property. She alleged that the property was orally gifted by Mahtab Khan to Waizuddin Khan. Waizuddin Khan gifted the same to Jaliluddin Khan the present plaintiff. The present plaintiff defaulted in payment of municipal tax and, therefore, the property was auction sold and the defendant No.3 Rakiba Khatoon purchased in auction sale. The learned counsel further submitted that after trial the trial court found that there was no oral gift by Mahtab Khan in favour of Waizuddin Khan and, therefore, the plaintiffs' suit was decreed. Rakiba Khatoon filed title appeal which was also dismissed. According to the learned counsel the gift by Mahtab Khan in favour of Waizuddin Khan has already been rejected in the earlier suit there is no question of ownership of Waizuddin Khan arises. In other words, Waizuddin Khan had no title in the property. In such circumstances there was no question of gifting the property to Jaliluddin by Waizuddin Khan arises.

8. So far this fact alleged by the respondent is concerned, it is not disputed by the appellant. On the other hand, in the plaint itself it has been admitted that in collusion the defendant 2nd party purchased the property in auction sale.

9. In view of the above contentions of the parties, the points arises for consideration in this appeal is as to whether the plaintiff is entitled for the reliefs claimed in the suit and whether the impugned judgment and decree are sustainable in the eye of law ?

10. As stated above admittedly, the plaintiffs pleaded in the plaint itself that the property was auction sold which was purchased by defendant 2nd party. It may be mentioned here that the defendant 2nd party is his own wife Rakiba Khatoon. It is also admitted fact that Rakiba Khatoon fought the suit i.e. Title Suit No. 71 of 1973. It is also admitted fact that according to the plaintiff he was and he is residing in the suit property with his children. The only pleading is that there was no notice to the plaintiff in earlier suit. Except this pleading there is nothing on record to prove this fact. The plaintiff only has been examined as PW 1 in this case. No doubt he has also baldly stated that there was no notice to him. The plaintiff never produced the judgment and decree and the trial court. He never prayed for setting aside the auction sale. If at all no notice was served on the plaintiff he could have approached the said court for setting aside the ex parte decree on the ground that no notice was served on him. It may be mentioned here that the trial court judgment was confirmed by the appellate court in the appeal filed by wife of the present plaintiff. It is not the case of the plaintiff that he has got strained relationship with the wife or that his wife is living separately or that his wife has got adverse interest. It further appears that in the appeal filed by his wife also he did not appear. In such view of the matter only because in one line he has stated that no notice was served on him in the pleading as well as in the evidence, the case of the plaintiff was not reliable particularly, when the same point was raised by his wife in the earlier suit which was negatived and the appeal filed by his wife was dismissed. It may be mentioned here that the

plaintiff cleverly pleaded in the plaint that defendant 2nd party purchased the property in auction sale instead of pleading that his wife purchased the property in auction sale. Considering all these circumstances the learned court below held that the suit filed by the plaintiff is barred by law of limitation because the decree is of the year 1978. The suit has been filed in the year 1991.

11. So far oral Hibba by wife of Jaliluddin the plaintiff is concerned it may be mentioned here that although the plaintiff claimed that the property was gifted earlier he produced Ext.-1 so called Hibbanama. It is not the pleading of the plaintiff that in recognition of oral hibba a document was executed. In my opinion, therefore, the learned court below has rightly disbelieved Ext.-1. From the above circumstances it appears that the first litigation was fought by the wife and when she lost the litigation now the husband is coming to fight the same litigation and thereby started second inning. From perusal of the impugned judgment it appears that the learned court below has rightly observed that it is the case of the plaintiff that in auction sale the property was sold. Although he had not specifically pleaded the name of the purchaser but admittedly the property was purchased by his wife. According to the pleading the 2nd party defendant is his wife Rakiba Khatoon. The plaintiff very cunningly in the description of his wife in the plaint only stated Rakib Khatoon daughter of Waizuddin Khan. Intentionally wife of the plaintiff has not been mentioned. When admittedly, the plaintiff wife purchased the property in auction sale and his wife became the owner of the property. This is the case of the present plaintiff. His wife admittedly fought the earlier suit up to the appellate court. This earlier suit was between the co-sharer. Admittedly, Rakiba Khatoon is the co-sharer of the defendant 1st party.

12. In view of the above facts and circumstances, the learned court below has rightly held that the plaintiff should have prayed for setting aside auction sale also. Moreover this question was gone into in the earlier suit as has been admitted by both the parties and the case of Rakiba Khatoon has already been disbelieved.

13. In view of my above discussions, the learned court below has rightly dismissed the plaintiffs' suit.

14. In the result, I find no merit in this first appeal and accordingly, this first appeal is dismissed. In the facts and circumstances of the case, the parties shall bear their own costs.